No. 22,059

United States Court of Appeals

For the Ninth Circuit

REIN J. GROEN and WILLIAM A. RICE,
Appellants,

vs.

LUSTIG FOOD CORPORATION, et al.,
Appellees.

APPELLANTS' REPLY BRIEF

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APPELLANTS' REPLY BRIEF

Under the cited cases of Appellants' and Appellee's briefs, it is quite clear that summary judgment in patent cases is usually frowned upon by all courts hearing such matters. Such a judgment deprives a person of his right to a trial on the facts. The very severe result of such a judgment in the case at bar actually strips the Appellants of their letters patent which the Patent Office saw fit to grant to them. It is just this type of harsh result which the courts are attempting to avoid in denying summary judgment.

VALIDITY OF PATENT

A presumption of validity follows from the issuance of a patent, and the burden is on the person alleging

invalidity to establish it. (Sec. 282 of the Patent Act of 1952, 35 USC Sec. 282 (1958).) The presumption of validity is strengthened where pertinent prior art was considered by the Patent Office, or the patent was granted after considerable contest in the Patent Office. Where the best of the art relied upon by an infringer was before the Patent Office, this fact strengthens the presumption of validity. (See Deller's *Walker on Patents,* Second Edition, Sec. 261, and cases cited thereunder.) Presumption of a patent's validity becomes all the stronger when the Patent Office has considered the most pertinent references bfore issuing the patent. (*Neff Instrument Corp. v. Cohu Electronics, Inc., et al.,* 131 USPQ 98, 298 F2d 82, CA 9 (1961).)

It will be noted that Appellee has cited *no* prior art to sustain its challenge of invalidity which was not before the Patent Examiner at the time the patent was granted. The Essipoff method was considered by the patent Examiner before the patent was granted (Motion Exhibit B, p. 50), and the court should have resolved any doubts as to the validity of the letters patent against the Appellees. (Fed. Civil Practice, California Contining Education of the Bar, 380.)

Actually, the presumption of validity is strengthened by the history in the Patent Office since it was granted only after considerable controversy. (*National Sponge Cushion Co. v. Rubber Corp. of Cal.,* 286 F2d 731, 128 USPQ 329, CA 9 (1961).) The presumption of validity which automatically attaches upon the issuance of a patent is strengthened when there were

extensive administrative proceedings concerned with the prior art. (*Otto v. Koppers Co.,* 114 USPQ 188, CA 4 (1957).)

Appellants respectfully contend that the summary judgment adjudicating the invalidity of the patent in suit was not proper in this case.

QUESTIONS OF MATERIAL FACTS

Although Appellee attempts in its brief to sidestep the questions of material fact which Appellants had a right to have tried, it has not been successful in so doing. The questions still exist:

1. Is the *combination* of steps the subject of the claim of U.S. Letters Patent No. 2,950,203 a patentable invention in the light of the state of the prior art and the laws pertaining to patents?

2. Does the lack of an unequivocal denial of infringement anywhere in the pleadings except in the answer presume infringement?

Appellee isolates certain steps of the patented process and attempts to show some of these steps were known to the prior art. However, it fails completely to show that the *combination of steps* per se was known to the prior art. Combinations exhibit invention when they embody improvements and their elements cooperate in a new and useful way to accomplish an improved result. (*Williams Mfg. Co. v.*

United Shoe Machinery Corp., 316 US 364, 86 L ed 1537 (1942). The blanching step or application of heat to the onions was used in some of the prior art; the Essipoff procedure did not encompass the individual freezing operation on each onion piece (Motion Exhibit C, page 12); and Appellee has cited no instance where the combination of steps as claimed by the patent was known to the prior art.

NO UNEQUIVOCAL DENIAL OF INFRINGEMENT

Appellee argues that the uncontroverted evidence before the trial court demonstrated non-infringement, but it fails to establish where in the pleadings there is an unequivocal denial of infringement other than in the answer. The material allegations of Appellants' complaint must be accepted as true and they must be given the benefit of the most favorable inferences which reasonably can be drawn therefrom. (*Jefferson v. Whitworth College,* 128 F Supp 219.)

Although Appellee describes in its answers to interrogatories (C.T. 60) a process by which frozen onions are prepared by it, there is no denial of preparing them by the Appellants' patented process. Moreover, Appellee's answer is predicated upon its conclusion that perhaps some of its other processes are not involved where it states, "Insofar as any method for the preparation of onions *which may be pertinent to the subject matter of this litigation. . . .*" (emphasis supplied) and then proceeds to describe one process

of producing a diced and frozen onion product. Consequently, there is no unequivocal denial of infringement other than in the answer, and Appellants should have been entitled to a trial on this issue.

Dated, Stockton, California,
January 18, 1968.

Respectfully submitted,
CHARLES A. ZELLER,
Attorney for Appellants.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CHARLES A. ZELLER,
Attorney for Appellants.